UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBTELECOM SH.A.,

Petitioner,

v.

UNIFI COMMUNICATIONS, INC.,

Respondent.

16-CV-09001 (PAE)

UNIFI COMMUNICATIONS, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO ALBTELECOM SH.A.'S PETITION TO CONFIRM A FOREIGN CONSENT ARBITRATION AWARD AND ENTER JUDGMENT THEREON AND IN SUPPORT OF ITS CROSS-MOTION TO DISMISS OR STAY THE PETITION

Joseph P. Goldberg
Carmine J. Castellano
HODGSON RUSS LLP
1540 Broadway, 24th Floor
New York, New York 10036
(212) 751-4300

Attorneys for Respondent
Unifi Communications, Inc.

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Respondent Unifi Communications, Inc. ("Unifi") respectfully submits this memorandum of law: (1) in opposition to Petitioner Albtelecom, Sh.a.'s ("Albtelecom") Petition, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted at* 9 U.S.C. § 201 (the "New York Convention"), to confirm a foreign consent arbitration award and enter judgment thereon (ECF Nos. 1-3); and (2) in support of Unifi's cross-motion to dismiss or stay the Petition.

PRELIMINARY STATEMENT

This proceeding arises out of a factual dispute concerning whether Unifi has breached the terms of a settlement agreement with Albtelecom whose terms were later incorporated and reproduced in full as part of a consent award.

On June 29, 2012, Albtelecom initiated an arbitration against Unifi in Switzerland under an agreement between the parties for international telecommunications services.

On April 16, 2015, the parties entered into a settlement agreement. Among other things, the settlement agreement: (1) requires Unifi to make monthly payments to Albtelecom pursuant to a schedule; and (2) requires the parties to "employ good faith efforts towards entering into a business agreement between themselves" by "negotiat[ing] either in writing, by telephone or in meeting(s) at Albtelecom premises."

On September 2, 2015, at the parties' request, the Swiss arbitrator incorporated and reproduced in full the terms of the parties' settlement agreement, as well as the agreed-upon payment schedule, as part of an Award by Consent (the "Consent Award").

Under the settlement agreement and Consent Award, Unifi made installment payments to Albtelecom for the following months: April, May, June, July, August, September, October, and November 2015.

By email dated December 28, 2015, Albtelecom—by its Swiss counsel, Christopher Bollen—agreed to suspend or defer Unifi's December 2015 monthly payment until "one month after the conclusion of the payment schedule as set forth in the Award by Consent."

In January 2016, Albtelecom and Unifi orally agreed that Unifi could stop making further monthly payments pending execution of a new business agreement between the parties, pursuant to which Albtelecom and Unifi would send telecommunications traffic to each other (the "Traffic Agreement"). The parties further agreed that Unifi's monthly payments would be resumed once the parties executed the Traffic Agreement and that any suspended payments would be added to the end of the payment schedule.

Pursuant to the parties' agreements, Unifi did not make installment payments to Albtelecom for the following months: December 2015 and January, February, March, April, May, June, July, August, and September 2016.

Pursuant to the parties' agreements, Albtelecom did not serve any formal default notices or otherwise request payment during this 10-month period.

However, on or about October 13, 2016, Albtelecom unexpectedly served a notice of default relating to the payments for December 2015 through September 2016.

After receiving the October 13, 2016 notice, Unifi recommenced making its payments and sent payments in December 2016, and January, February, and March 2017.

Albtelecom now moves to: (1) confirm the Consent Award under the New York Convention; and (2) based on Unifi's alleged breaches of the Consent Award, enter judgment against Unifi in an accelerated, lump sum amount (minus any payments made to date) pursuant to the terms of the Consent Award. The Petition should be dismissed, stayed, and/or denied for the following separate and independent reasons.

First, under Federal Rule of Civil Procedure 12(b)(1), the Petition should be dismissed because the New York Convention does not apply to the Consent Award, which is effectively a contract and not an "arbitral award." The New York Convention applies only to "arbitral awards." Here, the arbitrator did not resolve any aspect of the parties' dispute on the merits. Instead, the parties settled their entire dispute outside of arbitration and simply asked the arbitrator to incorporate the terms of their negotiated agreement, including the schedule of monthly installments, as part of the Consent Award. Thus, the Consent Award should have the status of a contract—not an internationally-enforceable "arbitral award" under the New York Convention.

Second, if the Petition is not dismissed under Rule 12(b)(1), it should be stayed because Unifi has initiated a new arbitration against Albtelecom in Switzerland arising out of the parties' agreement to suspend settlement payments and Albtelecom's failure to negotiate in good faith the terms of the Traffic Agreement. The settlement agreement as incorporated into the Consent Award is governed by Swiss law. And any disputes arising out of the settlement agreement as incorporated into the Consent Award—except for disputes relating to Unifi's payments—must be arbitrated in Switzerland. Moreover, as demonstrated in the accompanying Declaration of Daniel Hochstrasser (Unifi's Swiss counsel), the present dispute concerns several clauses arising under the settlement agreement, all of which should be referred to arbitration. Thus, the Petition should be stayed until a decision is rendered in the newly-commenced Swiss arbitration as to whether the parties agreed to suspend payments under the settlement agreement.

Third, if the Petition is neither dismissed nor stayed, it should be denied for several reasons insofar as it seeks entry of a judgment against Unifi. As an initial matter—even if the Court confirms the Consent Award (the first prong of the Petition)—it cannot automatically be converted into an accelerated, lump sum judgment against Unifi (the second prong of the Petition). Any judgment—based on the Consent Award—would only require Unifi to make the requisite monthly payments. Moreover, under the express terms of the Consent Award, if Unifi fails to make a monthly payment, Albtelecom may only file a *claim* for the accelerated, lump sum amount based on Unifi's alleged breaches of the settlement agreement (*i.e.*, the Consent Award). The Consent Award does not provide that Albtelecom is entitled to an accelerated, lump sum judgment in a summary fashion in the event of an alleged non-payment.

In the event that Albtelecom files a claim (or the Petition is viewed as the claim), there is no basis for this Court to summarily grant judgment to Albtelecom. As demonstrated in Daniel Hochstrasser's Declaration, the parties' agreement to suspend or defer settlement payments is valid and would be enforceable under Swiss law—even in the face of a "no oral modification" clause. Furthermore, there are genuine issues of material fact requiring discovery and a trial. For example, Unifi should be afforded the opportunity to depose Mr. Bollen, the attorney who confirmed the suspension of Unifi's December 2015 payment *in writing*. Albtelecom's former CEO, Erkan Tabak, the individual who verbally agreed to the suspension of Unifi's other payments, should also be deposed. Tellingly, no one actually employed at Albtelecom submitted a declaration in support of the Petition. After discovery, Unifi should be permitted to prove its defense at a trial.

Thus, if the Petition is neither dismissed nor stayed, it should be denied insofar as it seeks entry of a judgment against Unifi because: (1) Albtelecom must file a claim based on Unifi's alleged breaches of contract; (2) the parties' modification of the Consent Award would be enforceable under Swiss law; and (3) discovery and a trial are necessary.

FACTUAL BACKGROUND

I. THE CONSENT AWARD[1]

On April 16, 2015, while engaged in ongoing arbitration, the parties entered into a settlement agreement, thereby resolving all of the claims related to the arbitration. (*See* Goldberg Decl., Ex. A ¶ 96 (settlement agreement reproduced in full within the Consent Award); *see also* Declaration of Daniel Hochstrasser, dated March 3, 2017 ("Hochstrasser Decl."), Ex. 1 (the parties' actual settlement agreement).)

The next day, the parties informed the arbitrator that they had settled their dispute. (Goldberg Decl., Ex. A ¶ 97.) As a result, the arbitrator stayed all proceedings and cancelled an upcoming evidentiary hearing. (*Id.* ¶ 98.) On April 21, 2015, the parties asked the arbitrator to incorporate and reproduce the terms of their settlement agreement as the Consent Award. (*Id.* ¶¶ 100, 114 ("the Parties 'agree that the terms of their settlement shall be incorporated into a consent award…'") (quoting the settlement agreement).) On September 15, 2015, upon the parties' request, the arbitrator issued the Consent Award. (*Id.* ¶ 115.)

In the settlement agreement as incorporated and reproduced in full as part of the Consent Award, the parties promised to "employ good faith efforts towards entering into a business agreement between themselves." (*Id.* ¶ 96, cl. 7.1.) To that end, Unifi was required to submit a business proposal to Albtelecom and the parties were then required to "negotiate either in writing, by telephone or in meeting(s) at Albtelecom premises." (*Id.* ¶ 96, cl. 7.2.)

Section 12 (the "Dispositive Part") of the Consent Award required Unifi to make certain monthly payments to Albtelecom pursuant to a schedule. (*Id.* ¶ 118(i).) If Unifi fails to make a payment and fails to cure within 15 business days of written notice, Albtelecom "shall be entitled to *claim forthwith* the amount of EUR 2'100'000.00 less any payments made under Settlement Agreement and/or present Award by Consent to that date." (*Id.* ¶ 118(ii) (emphasis added).) The Consent Award does not provide that Albtelecom is entitled to an immediate judgment against Unifi.

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[1] The background of the parties' dispute and the procedural history of the arbitration in Switzerland is set forth in the Consent Award. (*See* Declaration of Joseph P. Goldberg, dated March 3, 2017 ("Goldberg Decl."), Ex. A (Consent Award) ¶ 96.)

The settlement agreement as incorporated and reproduced in full as part of the Consent Award is governed by the laws of Switzerland. (*Id.* ¶ 96, cl. 13.1.) All disputes—except those related to Unifi's payments—must be "finally settled" by arbitration in Geneva, Switzerland. (*Id.* ¶ 96, cl. 13.2.)

II. POST-SETTLEMENT DISCUSSIONS

After the parties entered into the April 16, 2015 settlement agreement, Albtelecom's former CEO, Erkan Tabak, and Unifi's CEO, Adrian Shatku, met in person, texted each other, and spoke frequently during the period from April 2015 through January 2016. (*See* Declaration of Adrian Shatku, dated March 3, 2017 ("Shatku Decl."), ¶ 3.) The objective of those meetings and communications was, among other things, to reach a Traffic Agreement as contemplated by clause 7 of the parties' April 16, 2015 settlement agreement, which was incorporated into the Consent Award. (*Id.* ¶ 4.)

Specifically, on or about May 20, 2015, Mr. Shatku met with Mr. Tabak in his office in Kashar, Albania. (*Id.* ¶ 14.) At the meeting, Mr. Shatku expressed a desire to find a way for Albtelecom and Unifi to work together. (*Id.*) Thereafter, on or about July 8, 2015, Unifi sent a proposal to Albtelecom for the parties to enter into a Traffic Agreement. (*Id.* ¶ 15.) On or about July 9, 2015, Vjola Shehu of Albtelecom confirmed receipt of the proposal and proposed a meeting to take place on July 16, 2015 at Albtelecom's office in Kashar, Tirana. (*Id.* ¶ 16.)

On or about July 21, 2015, Vjola Shehu sent an email setting up a meeting between Mr. Shatku and Mr. Tabak for July 22, 2015. (*Id.* ¶ 17.) At the meeting, Mr. Tabak confirmed that he would work with his "internal people" to reach a Traffic Agreement. (*Id.*) After the meeting, on or about July 22, 2015, Mr. Shatku sent Mr. Tabak a summary of the meeting and proposed that the parties move forward to execute a Traffic Agreement. (*Id.* ¶ 18.)

On or about July 30, 2015, Mr. Shatku sent a letter of interest to Ahmet Yildirim (Board Member of Calik Holding, an owner of Albtelecom) calling for cooperation between Unifi and Albtelecom. (*Id.* ¶ 19.) On or about August 14, 2015, Murat Cakmak (Chief Technical Officer of Albtelecom) emailed a draft agreement to Unifi. (*Id.* ¶ 20.)

On or about August 17, 2015, Unifi was reviewing the draft Traffic Agreement with Albtelecom. (*Id.* ¶ 21.) On or about August 19, 2015, a telephone conference was scheduled to discuss the Traffic Agreement. (*Id.* ¶ 22.) Mr. Tabak and various Calik executives were invited to participate. (*Id.*) On or about August 24, 2015, Unifi sent another written proposal to Albtelecom. (*Id.* ¶ 23.) On or about September 9, 2015, Gianluca Benedetti, Unifi's Commercial Director, sent a follow-up email to Albtelecom expressing his eagerness to work on the Unifi/Albtelecom partnership. (*Id.* ¶ 24.)

On or about September 14, 2015, Murat Cakmak sent an email indicating that Albtelecom was not interested in entering into an agreement with Unifi. (*Id.* ¶ 25, Ex. A.) On or about October 1, 2015, Mr. Shatku emailed Mr. Tabak asking to speak about the situation. (*Id.* ¶ 26, Ex. B.)

On or about October 12, 2015, Mr. Shatku sent another follow-up email to Mr. Tabak, which stated as follows:

> "Hi Erkan,
> Hope that you had a great weekend and doing well. I have Been trying to reach you for a while but regretfully no answer..from you…What about VAS and outbound and rest? Other than that as you well know part of our new relationship refresh building agreement was to have some good faith cooperation. I like where are with you and I and you and I had a pretty frank and open discussions in July but ever since then they have seem to fade and not sure what to do at this point? Would you kindly let me know? No sure if its a good time to speak with Ahmet as well concerning our acquisition proposal? Much appreciated. Happy to speak if its better for you but will not be in the region till 2nd week of Nov.
> With Regards, Adrian"

(*Id.* ¶ 27, Ex. C.)

On or about October 12, 2015, Mr. Tabak responded to Mr. Shatku stating that "there are some internal issues which block us [from] all kind of new agreements. Until second order." (*Id.* ¶ 28, Ex. D.) On or about November 9, 2015, Mr. Shatku met with Mr. Tabak at the Roger International Hotel in Tirana, Albania to again discuss the terms of a potential Traffic Agreement. (*Id.* ¶ 29.)

On or about December 28, 2015, Albtelecom's Swiss counsel, Mr. Bollen, agreed with Unifi's undersigned counsel that Mr. Shatku could again meet with Mr. Tabak in January 2016 for the specific purpose of discussing a modification of the payment schedule in the Consent Award. (*Id.* ¶ 30.) Mr. Bollen also agreed in writing that Unifi could make the November 2015 payment to Albtelecom on or before December 31, 2015 and that the December 2015 monthly payment would be suspended and added to the conclusion of the payment schedule set forth in the Consent Award. (*Id.* ¶ 31; *see also* Hochstrasser Decl., Ex. 2, Ex. C-6 (December 28, 2015 email from Mr. Bollen).) Unifi made the requested November 2015 payment on or about December 29, 2015. (Shatku Decl. ¶ 32.)

On or about December 29, 2015, Mr. Shatku sent Mr. Tabak a message wishing him "a very happy and healthy new year" and asking whether they could meet in Tirana, Albania on either January 12 or January 13, 2016. (*Id.* ¶ 33, Ex. E.) On or about December 29, 2015, Mr. Tabak responded by wishing Mr. Shatku a "Happy New Year" but he did not respond to Mr. Shatku's request to meet. (*Id.* ¶ 34, Ex. F.)

On or about January 7, 2016, Mr. Shatku tried to set up another meeting with Mr. Tabak and emailed him the following message: "Hi Erkan, Happy New Year. I will be in Tirana late Tuesday next week and Wed-Thursday-Friday. Will you be around to meet and catch up? With Regards, Adrian." (*Id.* ¶ 35, Ex. G.) On or about January 11, 2016, Mr. Shatku reached out to Mr. Tabak yet again with the following message: "Hi Erkan, Hope you had a great weekend. I would be grateful if you could make some time Thursday or Friday this week to catch up. Looking forward seeing you. Best Adrian." (*Id.* ¶ 36, Ex. H.)

Mr. Shatku was unable to meet with Mr. Tabak in Tirana, Albania in January 2016. (*Id.* ¶ 37.) Instead, they had a series of telephone calls to discuss the potential Traffic Agreement. (*Id.*) During those telephone calls, Mr. Shatku explained that Unifi was having difficulty making its payments under the Consent Award absent receiving telecommunications traffic from Albtelecom as contemplated under the Consent Award. (*Id.* ¶ 38.) Given the delays the parties had experienced in reaching a consensus, Mr. Tabak and Mr. Shatku agreed that Unifi would be allowed to stop making monthly payments pending the execution of a Traffic Agreement. (*Id.* ¶ 39.) They further agreed that the monthly payments would be resumed as soon as the parties executed a Traffic Agreement and that any suspended payments would be added to the end of the payment schedule—consistent with the agreement reached concerning Unifi's December 2015 installment payment. (*Id.*)

Consistent with Mr. Shatku's agreement with Mr. Tabak, Unifi ceased making monthly payments to Albtelecom beginning in December 2015. (*Id.* ¶ 7.) Also consistent with

Mr. Shatku's agreement with Mr. Tabak, Albtelecom did not send a default notice to Unifi for approximately ten months. (*Id.* ¶ 8.) Specifically, from December 2015 through September 2016, Albtelecom did not send a default notice to Unifi or otherwise request payment. (*Id.*)

On or about October 13, 2016, Mr. Bollen sent Unifi's counsel a letter alleging that Unifi was in default of its payment obligations for the period December 2015 to September 2016. (*Id.* ¶ 41; *see also* Declaration of Christopher Bollen, dated November 17, 2016 (ECF No. 3) ("Bollen Decl.") Ex. 3.) After an exchange of letters between the parties' respective counsel, Unifi thereafter resumed making payments under the Consent Award to Albtelecom as follows: December 28, 2016—EUR 28,000.00; January 17, 2017—EUR 28,000.00; February 13, 2017—EUR 28,000.00; and March 2, 2017—EUR 28,000.00. (Shatku Decl. ¶ 11.)

III. TOTAL PAYMENTS TO ALBTELECOM

In 2015, Unifi made payments to Albtelecom under the Consent Award as set forth below:

Date	Amount (in EUR)
April 17, 2015	200,000.00
May 14, 2015	28,000.00
June 15, 2015	28,000.00
July 13, 2015	28,000.00
August 12, 2015	28,000.00
September 14, 2015	28,000.00
November 30, 2015	28,000.00
December 29, 2015	28,000.00

(*Id.* ¶ 43, Ex. I.)

After receiving Mr. Bollen's October 13, 2016 default notice, Unifi has made the following payments to Albtelecom:

Date	Amount (in EUR)
December 28, 2016	28,000.00
January 17, 2017	28,000.00
February 13, 2017	28,000.00
March 2, 2017	28,000.00

(*Id.* ¶ 44, Ex. I.)

IV. THE PETITION

On November 18, 2016, Albtelecom filed the Petition asking this Court to: (1) confirm the Consent Award; and (2) based on the suspended payments for December 2015 through September 2016, enter judgment against Unifi in an accelerated, lump sum amount(s) plus interest from December 15, 2015 (and/or December 15, 2016).[2] (ECF Nos. 1-3.)

V. THE NEW ARBITRATION

On March 3, 2017, Unifi filed a Request for Arbitration with the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (the "ICC") in Paris, France. (Hochstrasser Decl., Ex. 2 (Request for Arbitration).) In the new arbitration, Unifi seeks an award, among other things, "declaring that the Parties have entered into an agreement of deferment, according to which [Unifi's] payment obligations under the Settlement Agreement of 16 April 2015 have been suspended since December 2015 and any suspended payments will be added to the end of the payment schedule, and that [Albtelecom] has breached its co-operation obligation as set out in the Settlement Agreement of 16 April 2015." (*Id.*, Ex. 2 ¶ 30.)

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[2] The amount of the requested judgment is unclear. (*Compare* ECF No. 1 ¶ 15 (seeking judgment in the amount of EUR 1,704,000 plus interest since December 15, 2016) *with* ECF No. 2 ¶ 2 (seeking judgment in the amount of $1,805,693.21 plus interest since December 15, 2015).)

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED BECAUSE THE NEW YORK CONVENTION DOES NOT APPLY TO THE CONSENT AWARD

The Petition should be dismissed, under Rule 12(b)(1), because the Consent Award does not qualify as an internationally-enforceable "arbitral award" under the New York Convention. Rather, the Consent Award merely incorporates the parties' settlement agreement and, thus, should be treated as a contract between the parties.

Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq.* (the "FAA"), the New York Convention applies only to the recognition and enforcement of "arbitral awards falling under the Convention." 9 U.S.C. § 207. The New York Convention neither defines "arbitral awards" nor mentions consent awards. In or about 2010, the United Nations Commission on International Trade ("UNCITRAL") commissioned the assistance of two experts—Professor Emmanuel Gaillard (head of Shearman & Sterling's International Arbitration Group) and Professor George A. Bermann (of Columbia Law School)—to prepare a guide on the New York Convention. (*See* Goldberg Decl., Ex. B; *see also* newyorkconvention1958.org.) On July 7, 2016, after three years of preparation, the UNCITRAL Secretariat Guide on the New York Convention, 2016 Edition (the "Guide") was presented at the United Nations Headquarters in New York. (*Id.*) Specifically, the Guide states that the New York Convention "is silent on the question of its applicability to decisions that record the terms of a settlement between the parties." (*Id.*) In fact, "[d]uring the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon." (*Id.*) The Guide further states that "[r]eported case law does not address this issue."[3] (*Id.*) Based on the silence of the New York Convention and the Guide, the New York Convention should not apply to consent awards.

Here, the parties agreed to settle their dispute outside of arbitration and simply asked the arbitrator to incorporate the terms of their negotiated agreement into the Consent Award. (*See, e.g.*, Goldberg Decl., Ex. A ¶¶ 100, 114 ("the Parties 'agree that the terms of their settlement shall be incorporated into a consent award…'") (quoting the settlement agreement).) Indeed, the arbitrator did not decide any aspect of the parties' underlying dispute on the merits.

Moreover, when the parties negotiated their settlement, they did *not* agree that Albtelecom would be entitled to an accelerated, lump sum judgment if Unifi breached the agreement. Instead, the parties agreed that Albtelecom could only file a claim for the accelerated, lump sum amount minus payments made to date. (*Id.*, Ex. A ¶ 118(ii).) Significantly, when the "consent award" issue was raised at the July 7, 2016 presentation of the Guide, relevant experts declined to include consent awards as "arbitral awards" falling within the scope of the New York Convention. The Consent Award should not be treated an "arbitral award" under the New York Convention, and the Petition should be dismissed for this reason alone.

II. THE PETITION SHOULD BE STAYED BECAUSE UNIFI HAS INITIATED A NEW ARBITRATION IN SWITZERLAND

Assuming *arguendo* that the Petition is not dismissed under Rule 12(b)(1), the Petition should be stayed pending the outcome of the new arbitration proceeding in Switzerland.

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[3] *But cf. U.S. v. Sperry Corp.*, 493 U.S. 52, 56-57 (1989) (noting that a settlement agreement between defendant and the Government of Iran—which was entered as an "Award on Agreed Terms" by an international arbitral tribunal known as the "Iran-United States Claims Tribunal"—was enforceable as an award pursuant to an agreement between the United States and Iran embodied in two declarations of the Government of Algeria commonly referred to as the "Algiers Accords").

"It is long settled that courts have discretion to stay their cases, as 'the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its own docket with economy of time and effort for itself, for counsel, and for litigants.'" *Fagan v. Republic of Aus.*, No. 08-cv-671, 2009 WL 1423338, at *4 (S.D.N.Y. May 19, 2009) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). "This authority is not limited to cases involving identical parties or issues." *Id.* (citing *Landis*, 299 U.S. at 254-55) (also discussing general stay factors). A court may enter a stay pending the outcome of other litigation which bears upon the case, even if such other proceedings are not necessarily controlling of the action that is to be stayed. *Lasala v. Needham & Co.*, 399 F. Supp. 2d 421, 427 (S.D.N.Y. 2005).

Pursuant to the terms of the settlement agreement as incorporated into the Consent Award, all disputes between the parties—except those related to Unifi's scheduled payments to Albtelecom—must be arbitrated in Switzerland. (Goldberg Decl., Ex. A ¶ 96, cls. 13.1 & 13.2.) Albtelecom filed the Petition seeking to confirm the Consent Award and enter judgment based on Unifi's failure to make payments. (ECF Nos. 1-3.) However, this entire dispute arises out of the parties' agreement to suspend or defer Unifi's payment obligations pending the resumption of the parties' business relationship. As noted by Unifi's Swiss counsel, "[t]he topics of resumption of business and the need to restructure Unifi's payment obligations, which led to Unifi suspending payments, were discussed together as being obviously closely connected." (Hochstrasser Decl. ¶ 27.) Unifi respectfully submits that—due the nature of this dispute—it should be arbitrated in Switzerland.

To that end, Unifi has initiated arbitration in Switzerland seeking, among other things, an award "declaring that the Parties have entered into an agreement of deferment, according to which [Unifi's] payment obligations under the Settlement Agreement of 16 April 2015 have been suspended since December 2015 and any suspended payments will be added to the end of the payment schedule, and that [Albtelecom] has breached its co-operation obligation as set out in the Settlement Agreement of 16 April 2015." (*Id.*, Ex. 2 ¶ 30.)

Moreover, the Consent Award does not expressly address how to deal with a dispute that relates to *both* Unifi's payments *and* other topics in the Consent Award (*e.g.*, the "no oral" modification provision and the parties' resumption of their business relations). (Goldberg Decl., Ex. A ¶ 96, cl. 13.2.) A Swiss arbitrator should interpret the parties' settlement agreement, which is the basis of the Consent Award, to determine the actual and mutual intention of the parties. In any event, deciding related issues in different forums is not an efficient use of judicial resources. A Swiss arbitrator—well-versed in his or her own law—will arguably be better suited to determine all issues. Staying the Petition would also avoid the possibility of inconsistent results between this Court's determination on enforcement and the Swiss arbitrator's decision. Accordingly, the Petition should be stayed.

III. THE PETITION SHOULD BE DENIED INSOFAR AS IT SEEKS ENTRY OF A JUDGMENT AGAINST UNIFI

Assuming the Petition is neither dismissed nor stayed, it should be denied insofar as it seeks entry of a judgment against Unifi because: (1) Albtelecom may only file a separate claim for the accelerated, lump sum amount as expressly stated in the Consent Award; (2) the parties' agreement to suspend payments pending the resumption of their business is proper and would be enforceable under Swiss law; and (3) fact discovery and a trial are necessary to resolve disputed issues of fact.

A. Albtelecom May Only File a Separate Claim for the Lump Sum

"Normally, confirmation of an arbitration award is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (quoting *Florasynth, Inc. v. Pickholtz*, 750 F.2d 171, 176 (2d Cir. 1984)). As such, arbitration awards are subject to "very limited review." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (quoting *Folkways Music Publishers v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993)).

In this case, even if the Court confirms the Consent Award under the New York Convention (the first prong of the Petition), absent a judicial determination that Unifi breached, the Consent Award cannot automatically be transformed into a judgment against Unifi in an accelerated lump sum (the second prong of the Petition). There is no language in the Consent Award permitting such a result. If the Consent Award is confirmed and converted into a judgment, Albtelecom would be entitled only to a judgment listing the monthly installments under the relevant schedule. (*See* Goldberg Decl., Ex. A ¶ 118; *see also* Hochstrasser Decl. ¶ 23 ("the mere wording of the relevant paragraphs of the dispositive part [of the Consent Award] reveals that the Award would, in any event, only set up a direct obligation with respect to instalment payments which are due…, and not with respect to the lump sum payment").)

Moreover, under the express terms of the Consent Award, if Unifi fails to make a monthly payment, Albtelecom may only "claim forthwith" the accelerated, lump sum amount—minus payments made to date.[4] (Goldberg Decl., Ex. A ¶ 118(ii); *see also* Hochstrasser Decl. ¶

[4] Albtelecom may also "present Award by Consent to that date," which merely permits Albtelecom to present the Consent Award for confirmation of the payment schedule. (Goldberg Decl., Ex. A ¶ 118(ii).) If Albtelecom seeks the accelerated lump sum, it must file a claim. (*Id.*)

23.) Thus, Albtelecom may only file a claim for such relief in a separate action based on Unifi's alleged breaches of the parties' settlement agreement (*i.e.*, the Consent Award).

B. The Parties' Rescheduling of Payments Would Be Enforceable Under Swiss Law

Assuming the Court considers the Petition as Albtelecom's "claim" under the Consent Award, Albtelecom is not entitled to summary judgment.

Under Swiss law, "contract parties are free to amend their initial arrangement, for instance by agreeing on a deferment or suspension of payment that postpones the due date or, if that has already occurred, temporarily defers its effect ("*Stundung*")." (Hochstrasser Decl. ¶ 10 (citing Swiss law).) In addition, "an agreement under Swiss law may be concluded in writing (as is the exchange of e-mails between Christopher Bollen and Joseph Goldberg), orally (as is the discussion between Adrian Shatku and Erkan Tabak) or by implied conduct." (*Id.* ¶ 17.1.) "This holds true despite the non-oral modification provision contained in clause 15 of the Settlement Agreement…because, according to the consistent case law of the Swiss Federal Court Supreme Court, contractual parties may deviate from any party-agreed form requirements by mutual agreement." (*Id.* (citing Swiss law).) "Such agreement to deviate can also be reached by tacit or implied conduct, *e.g.* where the parties fulfill and accept the amended contractual obligations without reservation" (as is the case here). (*Id.* (citing Swiss law).)

As noted by Mr. Hochstrasser, Unifi's Swiss counsel, "[t]he Parties' counsel's exchange of e-mails and Albtelecom's counsel's written statement made with regard to its client's consent that Unifi would be allowed to effect the December 2015 installment one month after the conclusion of the payment schedule, as well as the oral statements made by Adrian Shatku and Erkan Tabak in January 2016 with regard to their understanding that Unifi would be allowed to stop making payments pending execution of a new business agreement, are, under

Swiss law, to be interpreted as express and mutual expressions of intent to enter into an agreement of deferment." (*Id.* ¶ 17.2.)

Mr. Hochstrasser further notes that "[t]he Parties' conduct, which is, as outlined above, an important factor for establishing and interpreting the Parties' intentions under Swiss law, does, in [his] view, underpin the Parties' common understanding that they had reached an agreement of deferment." (*Id.* ¶ 17.3.) "On the one hand, Unifi suspended payments" and "[o]n the other hand and most importantly, Albtelecom did not object to that suspension." (*Id.*)

Based on the facts in this case, Mr. Hochstrasser has concluded that, under Swiss law, the parties entered into "a validly agreed deferment of payment." (*Id.* ¶ 19.) "Such an agreement, under Swiss law, entailed the result that Unifi, during the suspension, was not obligated to make any installment payments pursuant to clause 2.3 and the Annex of the Settlement Agreement and para. i. of the dispositive part of the Award and no default on the part of Unifi could occur." (*Id.* ¶ 20.)

Significantly, "[f]rom a Swiss enforcement law perspective…a court decision or arbitral award *cannot* be enforced for the time being if the conflicting parties, after the issuance of said decision or award, agree on a deferment or suspension of payment." (*Id.* ¶ 21 (citing Swiss law) (emphasis added).) "Applied to the case at hand, the valid agreement of deferment or suspension of payment would hinder, under Swiss enforcement law, the enforcement of the Award." (*Id.* ¶ 22.) Specifically, "the instalment payments from December 2015 pursuant to para. i. of the dispositive part of the Award could not be enforced under Swiss law because these debts have been deferred by mutual agreement after the issuance of the Award." (*Id.*) "The same would hold true with respect to the lump sum payment pursuant to para. ii. of the dispositive part of the Award." (*Id.*)

Thus, the Petition should be denied insofar as it seeks entry of a judgment against Unifi because the parties' agreement to suspend payments pending execution of the Traffic Agreement is valid and would be enforceable under Swiss law.

C. Discovery and a Trial Are Necessary

Even if this Court considers the Petition as Albtelecom's "claim" under the Consent Award, this Court should permit the parties to engage in discovery on Albtelecom's breach of contract claim and then hold a trial.[5]

In this case, there are genuine issues of material fact concerning Unifi's alleged breaches and the parties' agreement to suspend payments. Indeed, in support of the Petition, Mr. Bollen alleged that "Albtelecom did not agree that Unifi could stop making payments under the Consent Award nor did the Parties agree on a new payment schedule." (Bollen Decl. ¶ 27.) Mr. Bollen's allegation, however, is demonstrably false, as he confirmed that Unifi's December 2015 payment would be deferred until "one month after the conclusion of the payment schedule as set forth in the Award by Consent." (Hochstrasser Decl., Ex. 2, Ex. C-6 (email from Mr. Bollen).) Moreover, Albtelecom also failed to submit a declaration from anyone actually employed by Albtelecom to support Mr. Bollen's allegations.

In any event, Unifi should be permitted to take discovery on Albtelecom's claim by, among other things, deposing Mr. Tabak and Mr. Bollen—who both confirmed the parties' agreement to modify the Consent Award and suspend payments pending execution of the Traffic

[5] *Cf. HRH Constr., LLC v. Local No. 1, Int'l Union of Elevator Constructors*, No. 03-cv-8944, 2005 WL 31948, at *5 (S.D.N.Y. Jan. 5, 2005) ("Courts will order evidentiary hearings or discovery when there are disputed issues of fact in actions to confirm, vacate, or modify arbitration awards") (citing *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 57 (2d Cir. 2003) and other S.D.N.Y. holdings).

Agreement.[6] Litigation arising out of the parties' deferment agreement is not duplicative of the prior arbitration in Switzerland. This is a new issue. After discovery, the Court may then conduct a trial on Albtelecom's claim.

CONCLUSION

For the foregoing reasons, the Court should dismiss, stay or deny the Petition to the extent that no judgment be entered against Unifi.[7]

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Respectfully submitted,

HODGSON RUSS LLP

By: /s/ Joseph P. Goldberg

Joseph P. Goldberg
Carmine J. Castellano
1540 Broadway, 24th Floor
New York, New York 10036
(212) 751-4300
jgoldberg@hodgsonruss.com
ccastellano@hodgsonruss.com

Attorneys for Respondent
Unifi Communications, Inc.

[6] *Cf. HRH Constr.*, 2005 WL 31948, at *5 ("The discovery procedures of the Federal Rules of Civil Procedure are generally applicable to Title 9 proceedings.") (citing *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 702 (2d Cir. 1978)).

[7] Unifi denies the allegations in the Petition as set forth above.